reiterate that if there was any substance in her allegations of fraud and undue influence then what should have been put in issue immediately would be the validity of the second charge and in particular the attestation of her signature by the attesting solicitor. The failure to do so cannot but militate against lending any substance to her attempt by bare allegations of fraud and undue influence to repudiate the transactions entered into and resile from her obligations under the two charges. It is furthermore certainly not without considerable significance that the appellant never raised any allegations of fraud and undue influence when she was served with the notices of demand and the statutory notices of default in Form 16D with regard to the two charges well before the summons for the sale of the lands relating thereto was taken out nor did she deny that the amount claimed in these notices was not the amount due by Valor.

The learned judge was therefore in all these circumstances justified in finding no basis for the allegations of fraud and undue influence made by the appellant and also in rejecting the contention raised with regard to the consolidation of the accounts. He was equally correct in rejecting the argument that the summons for an order for sale in these proceedings should be stayed pending the disposal of the suit with regard to the guarantee given by the appellant. There was therefore every justification for making the order that he did on the summons and in being satisfied of no cause existing to preclude an order for the sale of the lands in question under section 256(3) of the Code.

There were no grounds whatsoever therefore calling for our intervention and on the conclusion of arguments before us we dismissed this appeal with costs and ordered the deposit lodged in court by way of security to be paid to the respondent to account of its costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

GANAPATHY CHETTIAR v. LUM KUM CHUM & ORS. MEENACHI v. LUM KUM CHUM & ORS.

[F.C. (Raja Azlan Shah C.J., Chang Min Tat & Abdul Hamid F.JJ.) November 17, 1980 & May 4, 1981]

[Kuala Lumpur — Federal Court Civil Appeal Nos. 30 & 34 of 1980]

Practice and Procedure — Consent orders — Order for sale of land — Application to vary consent order — Consent of parties.

In these cases the registered co-proprietors of a piece of land obtained a consent order for the sale of land by public auction. The public auction proved abortive. The first respondent (applicant in the High Court) applied that the public auction be withdrawn and the parties be at liberty to sell their shares by public treaty. The appellants in these two appeals (the second and third respondents in the High Court) desired to carry on with the auction but alternatively they asked to sell their undivided shares by private treaty. At the hearing of the applications, counsel for the second and third respondents in the High Court said that one of his clients wished to withdraw the prayer for sale by private treaty. The court refused the application to withdraw and an order was made allowing the parties to sell their shares by private treaty. It appeared that the other parties had already sold their shares in the land by private treaty, in anticipation of the consent of the appellants. The appellants appealed.

Held: (1) an order by consent is evidence of a contract between the parties and is binding on all parties to the order all the more so, where there is not the slightest question of any mistake as to facts or law;

(2) since there had been no mistake on the part of any one when the consent order for the sale by public auction was made, the only possible way in which this could be altered would be by the consent of all the parties;

(3) in this case the learned judge was right in holding that it was too late to withdraw the prayer for sale by private treaty and therefore there was the consent of all the parties which gave him jurisdiction to alter the consent order.

Cases referred to:-

(1) *Kinch* v. *Walcott* [1929] A.C. 482.

(2) *Australasian Automatic Weighing Machine Co.* v. *Walter* (1891) W.N. 170.

FEDERAL COURT CIVIL APPEAL NO. 30 of 1980.

T. Ariarajah for appellant.

M. Segaram for the 1st respondent.

K. Thayalan for the 2nd respondent.

R.R. Sethu for the 3rd respondent.

FEDERAL COURT CIVIL APPEAL NO. 34 of 1980.

R.R. Sethu for the appellant.

M. Segaram for the 1st respondent.

K. Thayalan for the 2nd respondent.

T. Ariarajah for the 3rd respondent.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): As the result of unhappy differences between the registered co-proprietors of a piece of land, an application was made by one of them for the sale of the land by public auction. A consent order was made in terms on June 19, 1973. It was duly drawn up and perfected. In the consequential summons for directions, as amended, among the terms and conditions set for the sale, a reserve price, as is usual in such cases, was fixed. There was liberty to apply.

The sale by public auction proved abortive. We do not know the reason, but in all likelihood, the reserve price was set too high.

Next, the first respondent died. Both the second and third respondents and the applicant applied separately to substitute the executors of the deceased owner's estate in the action. The second and third respondents desired to carry on with the auction. Alternatively, they asked to sell their undivided shares by private treaty. The applicant asked, more generally, that the public auction be withdrawn and the parties be at liberty to sell their shares by private treaty.

At the hearing of the two applications, Mr. Ariarajah, counsel for the second and third respondents, advised the court that "his client" (advisedly, in the singular) desired to withdraw the prayer for sale by private treaty. He did not say what his other client wanted. Counsel for the representatives of the first respondent and for the applicant objected to the pro-

posed withdrawal of this particular prayer. The court refused the application to withdraw and an order was made allowing the parties to sell their shares by private treaty.

This order was therefore made against the wishes of one of Mr. Ariarajah's two clients. Who this person was can now be seen from the appeal lodged by Mr. Ariarajah. She is Meenachi, the wife of the other client of his. But there apparently was no conflict of interests, since this other client has now by another firm of solicitors lodged his own appeal. There are now two appeals, each making the other appellant a respondent, and two sets of appeal records, identical in all respects, even in respect of the grounds of appeal, though not in expression.

The order now appealed from obviously varied the consent order. The appeal was therefore grounded almost entirely on the jurisdiction of the court to vary an order which it had made and which had been drawn up and perfected. The question is whether in the circumstances the jurisdiction exercised by the court can be justified.

The answer to the question is obvious and, with respect, is so clearly stated in paragraph 2011 of Volume 2 of either the 1976 or the 1979 Supreme Court Practice that we will merely content ourselves with repeating that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. It may be pleaded as an estoppel: *Kinch* v. *Walcott.*[1] All the more so, in our view, since there is not the slightest question of any mistake as to facts or law. A co-proprietorship of agricultural land which is under cultivation is at best an uneasy proposition and when the conditions pertaining are such that production must suffer, the time has come for the parting of the ways. This could be achieved by one of several ways. One of the co-proprietors could buy out the others, or the land could be partitioned, or the land could be sold either by private treaty or by public auction. This is not unknown to the parties: see the letter dated June 6, 1970 from the then solicitors of the applicant to the other co-proprietors. It was in this understanding of the situation facing them and the alternatives open to them that all the co-proprietors consented to a sale by public auction.

Yet in these circumstances and despite the fact that at the hearing his counsel had not voiced any objection on his behalf, Ganapathy Chettiar lodged an appeal from the order made. We could not understand how he could now object and on the facts pertaining to his case, we would have dismissed his appeal on no other consideration.

Meenachi's appeal was at least consistent with her objection at the hearing, if not with one of the prayers in her application. Since there had been no mistake on the part of anyone when the consent order for the sale by public auction was made, the only possible way in which this order could be altered would be by the consent of all the parties: *Australasian Automatic Weighing Machine Co.* v. *Walter.*[2] Her objection, if taken into consideration by the court, would effectively remove from the court any jurisdiction to make the order. But in making the application she gave that consent. Her husband at the hearing did not seek to withdraw that consent. The learned judge refused Meenachi's application made orally to withdraw the consent in terms of one of the prayers in her joint application and if the learned judge was right, there was therefore before him the consent of all the parties which would effectively give him the jurisdiction to alter the consent order.

When the appeals were argued before us, counsel for the respondents to the appeal advised us that their clients' shares in the land had now been sold and the transfers executed. As we understood the position, this sale was effected in anticipation of the consent of Meenachi and her husband Ganapathy Chettiar expressed in the second prayer of their application which was for leave to sell by private treaty. In view of this, we were of the opinion that the learned judge was right in holding that it was then too late for them to withdraw their prayer. We accordingly dismissed the appeals with costs.

Appeals dismissed.

Solicitors: *T. Ariarajah & Co.; M. Segaran & Co.; Skrine & Co.; Sethu, Ghazali & Gomez.*

TEO AH BIN v. TAN KHENG GUAN

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) March 8 & May 5, 1981]

[Johore Bahru — Federal Court Civil Appeal No. 103 of 1980]

Practice and Procedure — Summary judgment — Service outside jurisdiction — Service by advertisement in newspapers — Application to set aside judgment — Application allowed by trial judge — Appeal — R.S.C. 1957, O. 14A, O. 27, r. 15, O. 28, r. 11.

In this case the appellant had filed a specially indorsed writ claiming specific performance of an agreement between him and the respondent. Leave was obtained to serve the writ outside jurisdiction and when it appeared that the writ could not be served on the respondent in Singapore, leave was obtained to publish a notice in newspapers in Singapore. When the respondent did not enter appearance, the appellant obtained leave to enter judgment under Order XIVA. Subsequently the respondent applied to have the judgment set aside.

The learned judge set aside the judgment on the grounds (1) that he was satisfied that the method of substituted service approved by him did not or was not likely to bring knowledge of the writ to the respondent and therefore the service was bad; (2) that the appellant had obtained an order for more than what he had prayed for. The appellant appealed.

Held: (1) the High Court has an inherent power to set aside its own order made under the present circumstances;

(2) the Appeal Court should not interfere with the exercise of a discretion by the High Court in this case in setting aside the judgment on the ground that the substituted service by advertisement was not such as to make the respondent aware of the proceedings as the view of the learned judge was supported by evidence as to the unsatisfactory nature of the mode of substituted service he had had allowed;

(3) having decided that the respondent had a defence on the merits, the learned judge was right in setting aside the order on substituted service and the judgment.

Cases referred to:-

(1) *Eu Hoong Chwee* v. *Chua Say Tiong* [1968] 2 M.L.J. 12.